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No. 06-379

IN THE

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SUPREME COURT, U.S.

SUPREME COURT OF THE UNITED STATES

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EMILY ABEL WAGNER, *Petitioner*

versus

THE BOARD OF SUPERVISORS OF
LOUISIANA STATE UNIVERSITY
AGRICULTURAL AND MECHANICAL COLLEGE,
ROBERT MATHEWS, IRVING LANE, *Respondents*

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On Petition For a Writ of Certiorari
To The Court of Appeal of Louisiana,
First Circuit

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PETITION FOR REHEARING

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ARGUMENT

The Court should grant certiorari in this case to clarify for students and universities whether universities must establish a reasonable nexus between dismissal decisions and the academic basis for dismissal decisions and whether universities are obligated to inform the student of the school's dissatisfaction and reason(s) for the **academic** dissatisfaction. Graduate students should be entitled to these basic rights even under the Court's decisions in *Curators of University of Missouri v. Horowitz,*[1] and *Regents of University of Michigan v. Ewing,.*[2] However, because those decisions resulted from the universities "inviting" the Court to "assume" students have property rights, and Louisiana declines to issue such an invitation, this Court allows Louisiana to assume students have no rights.

This denial of certiorari exacerbates the student's subservient status, not only harming petitioner, but also visiting harm on already vulnerable graduate students from now until this Court sees fit to require academic dismissals be based on (1) legitimate academic reasons that are (2) communicated to the student. Until this court defines and clarifies the Court's standards for justifying an "academic" dismissal, a barrage of cases will test the Supreme Court's intended meaning in *Horowitz* and *Ewing* beyond poor hygiene and a low test score. Universities will push the envelope, just as Respondents did here. This uncertainty created and perpetuated by the Court is unfair to both students and universities.

I. Did the Court intend *Ewing* and *Horowitz* to foreclose opportunity for graduate students by explicitly depriving them of any property interest in their educations?

The Supreme Court assumed without deciding that

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[1] *Curators of University of Missouri v. Horowitz,* 435 U.S. 78 (1978).

[2] *Regents of University of Michigan v. Ewing,* 474 U.S. 214 (1985).

graduate students have a property right in their continued educations.[3] Since those decisions, courts have "noted the existence of a split among the circuits over the extent of due process protections for property rights after *Ewing*."[4] Most courts follow the Supreme court's lead by "assuming" students have a property right in their educations.[5] However, other courts interpret *Ewing* to definitively confer property rights on enrolled students. "The United States Supreme Court has held that a student who has been accepted to a university has an implied contractual right to continued enrollment in that university. . . This implied contractual right gives the student the right to continued enrollment free from arbitrary dismissal."[6] Similarly, in the case of *Gossett v. Oklahoma ex rel. Bd. Of Regents for Langston U.*, "As an initial matter, we note that Mr. Gossett had a property interest in his place in the Nursing School program that is entitled to due process protection under the Constitution."[7]

Although *Horowitz* is frequently cited to dispose of the question as to whether students have a property right to their education,

> *Horowitz* is not dispositive of the question of whether Hughes was deprived of a protected property interest. Contrary to the University's assertions, the Supreme Court in *Horowitz* did not reject the student's claim that she had been deprived of a protected property interest. First, the student did not claim a property interest in *Horowitz*. Second, the Supreme Court, in assuming the existence of the student's claimed liberty interest, also stated that it was assuming the existence

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[3] *Horowitz*, 435 U.S. 78 (1978). *Regents of University of Michigan v. Ewing*, 474 U.S. 214 (1985).

[4] *Neuwirth v. Louisiana State Bd. of Dentistry*, 845 F.2d 553, 559, (La.,1988).

[5] *See Richmond v. Fowlkes*, 228 F. 3d 854, 859, (Arkansas 2000).

[6] *Carlton v. Trustees of University of Detroit Mercy*, 2002 WL 533885, Mich.App.,2002. Page 2

[7] 245 F.3d 1172, 1181 C.A.10 (Okla.2001).

> of a property interest. And finally, in addressing the student's substantive due process claim, the Court assumed that such an interest, if it even existed, would receive substantive due process protection under the Due Process Clause.[8]

In the present case, Louisiana's First Circuit concluded the U.S. Supreme Court decisions in *Ewing* and *Horowitz* means that graduate students have no property or liberty interest in their graduate education regardless of their time, money, and work invested into their programs or their academic merit. Louisiana's First Circuit stated:

> [T]he United States Supreme [C]ourt has considered whether the right to "continued" enrollment to university programs is a federally protected right under the due process clause of the Fourteenth Amendment and has refused to definitively recognize such a constitutionally protected property interest.[9]

However, contrary to the First Circuit's conclusion, this Court's **assumption** that a student **has** a property right is not the same as a declaration a student has **no property right**. The First Circuit's failure to follow the Supreme Court's lead and assume petitioner has a property right to her education allowed the First Circuit to give short shrift to petitioner's right to due process.

The varying interpretations given to the Supreme Court's valuation of a student's rights enables the First Circuit to obscure and excuse the conscience shocking deprivation petitioner suffered at the hands of Lane with acquiescence from Mathews and LSU. The Supreme Court should grant certiorari to clarify the nature of a graduate student's property right or interest in her education and the required conditions

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[8] *University of Mississippi Medical Center v. Hughes*, 765 So. 2d 528, 537 (2000).

[9] *Wagner v. Board of Sup'rs*, page 12.

precedent for her dismissal.

II. Do the Supreme Court's decisions give graduate schools license to arbitrarily dismiss students?

The Supreme Court indicated that students dismissed arbitrarily or because of capricious or malicious motives would be afforded some protection.[10] The court in *Ewing* described in detail the justification for their conclusion that Ewing's dismissal was not arbitrary. Indeed the *Axson-Flynn* court raised the court's obligation to review for arbitrariness to the status of a duty. "Although we do not second-guess the pedagogical wisdom or efficacy of an educator's goal, [Footnote omitted] we would be abdicating our judicial duty if we failed to investigate whether the educational goal or pedagogical concern was pretextual."[11] Similarly, in the *Gossett* case, "the notion of judicial deference to academic decisions loses force when, as here, the decision maker is 'accused of concealing nonacademic or constitutionally impermissible reasons' for its action."[12] In *Sylvester v. Texas Southern University*, Judge Hughes explained that

> "the constitution does not define the benefits that a state must furnish nor the process it may use other than to require that similarly situated people be treated similarly. Because in the exercise of its state authority, TSU has afforded a meaningful review to other students who protested their grades, TSU must provide that benefit to Sylvester. Governmental actions cannot be arbitrary. Having no basis for comparison is arbitrary. Changing the committee on the chairman's malicious whim is arbitrary.[13]

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[10] *Curators of University of Missouri v. Horowitz*, 435 U.S. 78, 91-92 (1978). *Regents of University of Michigan v. Ewing*, 474 U.S. 214, 224-225 (1985).

[11] *Axson-Flynn v. Johnson*, 356 F.3d 1277, 1292-1293, (Utah 2004).

[12] *Gossett v. Oklahoma ex rel. Bd. of Regents for Langston University* 245 F.3d 1172, 1181 C.A.10 (Okla.),2001.

[13] *Sylvester v. Texas Southern University*, 957 F. Supp. 944, 947 (1997).

Judge Hughes based his conclusion that Sylvester's professor exceeded the bounds of professional conduct by a detailed account of his arbitrariness.[14]

Though acknowledging Petitioner's allegation that Lane's decision to discard her was motivated by maliciousness, the First Circuit's decision ignores the issue of whether Lane's actions were malicious. Instead, the court simply asserted that "the record clearly supports the finding that the decision not to extend an additional year to plaintiff was careful and deliberate"[15] and "that the alleged arbitrary interference of which she complains was simply Dr. Lane's action in seeking to have the timeline agreement honored."[16] The First Circuit ignores the likelihood that the very existence of a "Timeline agreement," which applied only to Petitioner, could itself have been evidence of malicious intent. Further, the First Circuit makes no effort to detail the facts in the record that "clearly supports" Respondents' denial of an extension. "Clearly," there are no such facts, but only conclusory statements not based on facts. The First Circuit's superficial review ignored evidence for improper motives and unquestioningly "assumed" the validity of Lane's conclusion that petitioner is unworthy.

"Clearly," neither the First Circuit, nor respondents understand that academic dismissals must have an academic basis. The Supreme Court's deference to Universities is based on the assumption that universities operate in good faith and understand the difference between pretextual or arbitrary "reasons" and legitimate academic reasons. This assumption

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[14] Judge Hughes noted that "Bullock gave 'yes' as the full answer to part of question V, and he gave no answer for another section. No student could have received a perfect score for answering "yes" to an essay question on a law school final, yet that was the correct answer on Bullock's key." *Sylvester v. Texas* at 946.

[15] *Wagner v. Board of Sup'rs* at Page 11.

[16] *Wagner v. Board of Sup'rs* at Page 16.

is wasted on LSU. To protect graduate students from arbitrary dismissals, certiorari should be granted to clarify what the Court means by an "academic" basis for dismissal.

III. Were Lane's actions a "substantial departure from accepted academic norms as to demonstrate that the person or committee responsible did not actually exercise professional judgment"[17]?

The Court provides little guidance in defining "accepted academic norms," "careful and deliberate," or "professional judgment." Case law tends to be lenient toward universities in defining these terms so that whatever the "professional" does is deemed to be "professional."[18] However, some courts have had the courage to identify conduct that "exceeds professional norms" or does not show professional judgment. For example, the judge in the *Gutzwiller* case had no difficulty deciding "a decision to deny tenure on the basis of a candidate's sex is, as a matter of law, such a substantial departure from accepted academic norms as to demonstrate that Fenik and Cohen did not exercise professional judgment."[19] Judge Hughes in the case of *Sylvester v. Texas Southern University* was more courageous when he declared that Karen Sylvester "had a right to both procedural and substantive due process in contesting her grade; she received neither."[20] In the Leonard case, the court speculated that

> "the faculty may have been acting in bad faith or motivated by ill will when they implemented the changes to the advanced seminar. Likewise, while the final grade which Leonard received for this course may technically qualify as an "academic decision," a reasonable jury could conclude that this grade was not

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[17] *Regents of University of Michigan v. Ewing*, 474 U.S. 214, 225 (1985).

[18] *Schuler v. University of Minnesota*, 788 F.2d 510, 516, (Minn.),1986.

[19] *Gutzwiller v. Fenik*, 860 F.2d 1317, 1329 (1988).

[20] *Sylvester v. Texas Southern University*, 957 F. Supp. 944, 947 (1997).

> actually based on the professor's professional judgment but, instead, intended as a way to prevent Leonard from continuing in the Physical Therapy program. . . . a faculty should not be allowed to insulate a decision based on its apparent dislike for a student by cloaking it in the guise of an "academic decision."[21]

In the present case, neither Lane nor the University pretended their reason for dismissing petitioner was "academic." However, the First Circuit Court of Appeal built their own "straw man" and proceeded to knock it down to justify petitioner's expulsion. It is true that Lane's "decision not to extend an additional year to plaintiff was careful and deliberate"[22] but "careful and deliberate" can be applied to any malicious conspiracy. Are these the "careful and deliberate" procedures the Supreme Court intended universities to employ to determine which students would be sacrificed? The First Circuit's opinion goes on, "Clearly, the individual merit of each student's need for additional time governs whether such an extension is granted,"[23] but the court did not bother to explain why Petitioner's need for more time lacked "merit" while the 62 other students who each received as much time as they needed were "assumed" to have merit.

IV. How does the arbitrary categorization of graduate students as deserving or undeserving of more time advance a legitimate state interest sufficient to justify the harm done to those excluded?

Strict scrutiny is used by the Court to remedy the effects of discrimination on African Americans. This is

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[21] *Leonard v. University of Delaware*, 2000 WL 1456295 (Page 7) Not Reported in F.Supp.2d, D.Del.,2000.

[22] *Wagner v. Bd. of Sup'ervisors of Louisiana State University, Robert Mathews, Irving Lane*, 04- 2216 (La. App. 1st Cir. 11/4/05) Page 11.

[23] *Wagner v. Board of Sup'rs* at Page 14.

justified because from the Court's decisions in *Plessy v. Ferguson*[24] to the Court's decision in *Missouri Ex. Rel. Gaines v. Canada,*[25] this Court was responsible for creating and perpetuating underdog status for non-white citizens in all endeavors, including, for example, education,[26] recreation,[27] and transportation.[28] By relying on stare decisis and states' rights and ignoring the text of U.S. 42 § 1983 and the 14th Amendment this Court maintained underdog status for black people by ensuring (or assuming) that they had no remedy under law. In Louisiana, blacks "clearly" had no rights even though other states "assumed" blacks had rights.

Just as there never was a constitutional basis for "separate but equal," there is no constitutional basis for having different levels of scrutiny which allow states to violate all but the most "fundamental" individual rights. To single out some individual rights as less deserving simply leads to another underclass created and perpetuated by state action, different from state to state, and rubber stamped by this Supreme Court.

Here, the Louisiana First Circuit, Court of Appeal assumes students "clearly" have no rights in contrast to the majority of states which "assume" students have rights. Further, the First Circuit opines that "where no fundamental or express constitutional right or 'suspect' class, nor any other enumerated class such as birth, age, sex, culture or political affiliation is alleged as the basis for discrimination, the use of another classification is subject to the minimal or lowest level of scrutiny."[29]

The First Circuit goes on to "assume" respondents have a rational basis for the seven year limit (which was not

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[24] 163 U.S. 537, 544, 16 S.Ct. 1138, 41 L.Ed. 256 (1896).

[25] 305 U.S. 337, 59 S.Ct. 232, 83 L. Ed. 208 (1938).

[26] *Lum v. Rice,* 275 U.S. 78, 48 S. Ct. 91, 72 L. Ed. 172 (1927).

[27] *Boyer v. Garrett,* 183 F. 2d 582 (1950).

[28] *Chiles v. Chesapeake and Ohio Railway Co.*, 218 U.S. 71, 30 S. Ct. 667, 54 L. Ed. 936 (1910).

[29] *Wagner v. Board of Sup'rs* at Page 12.

even an issue in the lawsuit) and concludes that the seven year limit does not violate the equal protection clause. However, the First Circuit makes no effort to explain or defend Respondents' categorization of graduate students, each needing additional time, into those granted more time (the lucky innies) and those denied more time (the unlucky outies). Since the record omits any standards or criteria for group membership, we can speculate, based on petitioner's personal experience, that the criteria for being an "unlucky outie" could be being out-spoken, employed, married, female, old, hard-working, conservative, and/or having children. To use LSU's reasoning, "clearly" these are valid reasons to discard a graduate student. The "lucky innies," allowed more time, probably all deserve additional time, but what quality sets the "unlucky outies" apart from the "lucky innies?"

The question the First Circuit failed to address was, "What is the rational basis for categorizing graduate students who have come to the end of their seven years into those allowed more time to complete their research and those denied additional time?" The Court should agree with Petitioner's position that Respondents' mechanism for granting or denying extensions even violates the rational basis test.

V. What impact will this court's denial of Certiorari have on the plight of graduate students?

This Court can reason, just as Louisiana's First Circuit did, that petitioner "clearly" deserved to be expelled. After all, the Court set the precedent for blaming the victim in the *McElroy* case by speculating the cafeteria worker who was denied her security clearance "might" have been careless with her identification badge. [30] The impact of the Court's decision to avoid the difficult task of clarifying students' rights by denying certiorari will extend beyond the harm to Petitioner. Just as Louisiana's First Circuit concluded the

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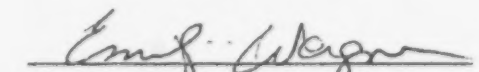
[30] *Cafeteria and Restaurant Workers Union, Local 473, AFL-CIO v. McElroy,* 367 U.S. 886, 898, 81 S. Ct. 1743, 1750 (1961).

Court's "assumption" that graduate students **have** property rights really means they have **no** property rights, Louisiana courts will assume that state universities do not need an academic reason or even a pretext to justify a student's dismissal. Universities do not even need to follow their own rules because they need only declare that **this** rule does not apply to **this** student in **this** situation, and courts will agree. Word will spread among universities that graduate students have no rights and can be arbitrarily expelled. This will allow graduate schools to make short shrift of graduate students' First Amendment rights because they will be allowed to discard annoying graduate students who question professors' research, who voice independent opinions, or who are not sycophants, under the radar, without even needing an academic pretext, because the courts will supply one.

CONCLUSION

Petitioner prays that this Court will reconsider its denial of certiorari. If these issues are not addressed, graduate students unfairly expelled will maintain their status as members of an underclass with no legal recourse. There is no merit in waiting fifty more years to recognize that graduate students who have earned liberty and property right to the opportunity to pursue their degree[31] and continue their research are entitled to due process before the right is taken.



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[31] *See Dixon v. Alabama State Board of Education*, 294 F.2d 150, 157 (5th Cir.-OLD 1961).